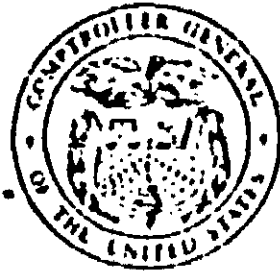


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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE:

DATE: August 18, 1982

B-206555

MATTER OF:

Central Mechanical, Inc.

DIGEST:

An assignment of funds held by the Government as retainages or allegedly due the bidder under other Government contracts in lieu of a bid bond lacks the requisite obligation as of the date of bid opening because the amounts actually payable from the funds held are contingent upon a number of factors extraneous to the bid.

Central Mechanical, Inc. protests the rejection of its bid under Invitation for Bids (IFB) No. DACA63-82-B-0013 issued by the Fort Worth District Office of the Corps of Engineers (Corps). Central's bid was rejected because it did not include with its bid a bond duly executed by a bonding agent. Instead, Central attached to its completed bid bond form (Standard Form 24) a handwritten document purporting to pledge and assign as collateral all amounts which were due and payable or held as retainage under three identified ongoing Government contracts. We deny the protest.

The protester contends that its bid should be accepted because it met the definition of a bid guarantee set out in the Defense Acquisition Regulation (DAR) § 10-101.4 (1976 ed.) as explained in paragraph 4 of the Standard Form (SF) 22 which was included in the IFB.

SF 22, paragraph 4 states that:

"A bid guarantee shall be in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit or, in accordance with Treasury Department regulations, certain bonds or notes of the United States."

Central asserts that the above list is merely illustrative of the kind of security that is considered sufficient, that it is the substance of the guarantee which should control, and that in fact there is no more substantial guarantee that could be given than a firm commitment accompanying a bid permitting the Government to continue to hold money which already is in its possession. The protester says that there can be no doubt that its unqualified "pledge and assignment" of these funds to satisfy the bonding requirement was a firm commitment which entitled the Government to hold these funds as long as necessary to accomplish the purpose of the bonding requirement. Further, the protester says, the amount of the security given is sufficient because there were sufficient funds being held by the Corps' Fort Worth District Office, which were then due and payable, to cover the difference between the protester's and the next low offeror's bid.

The Corps, on the other hand, maintains that the purported "assignment" of funds would violate the Assignment of Claims Act, 31 U.S.C. § 203 (1976). The Corps also asserts that the "assignment" actually does not involve funds which are "due and payable" insofar as the funds are held as "retainage" on an ongoing contract (i.e., held as security to assure completion). In any event, the Corps contends, the "assignment" does not provide a firm commitment as envisioned under SF 22 because the monies, if withheld, would be subject to setoff to pay other debts that Central may owe the Government.

Further, the Corps maintains that insurmountable administrative difficulties would result if offerors were permitted to pledge funds due them, because it would be necessary for contracting agencies to determine the status of funds held by other agencies. Even within the Fort Worth District, the Corps says,

"withholding contract funds for such a purpose * * * would leave the Government with the responsibility for record keeping and paperwork necessary for processing such a transaction and with potential liability for attendant errors and mistakes without Government consent to such responsibilities. Finally, it would necessitate an additional

clearance through the Procurement and Supply office for release of such [monies], * * *

At the outset, we note that one of the three contracts listed in the protester's assignment was identifiable from its contract number as being a contract of the Fort Worth District Office--the office conducting the procurement. The sum of \$56,494 was due and payable on that contract, and the contracting office had approved that amount for payment the day before bids on the disputed contract were opened, leaving routine processing by accounting and finance personnel before payment would be made. The \$56,484 exceeds the difference between Central's and the next low base bid, (the Corps intends to award a contract only for the base quantity), and thus is sufficient in amount to cover that portion of the work. Arch Associates, Inc., B-183364, August 13, 1975, 75-2 CPD 106.

We are nonetheless of the view that the purported assignment lacks the requisite firm obligation required of a bid guarantee, simply because the amounts payable to a contractor from funds held by the Government for final payment or as retainages under other Federal contracts are contingent upon a number of other factors. For example, as the Corps notes, these funds may be subject to set-off for debts owed to the Government; they may be subject to tax liens filed by the Internal Revenue Service; they may be subject to the claims of sureties or assignors; they may even have already been disbursed but not received by the contractor.

As of the time of bid opening, then, a contracting officer could not be certain if the funds are in fact available for their intended purpose, without further investigation as to their legal status. In our opinion it is therefore not possible to determine the legal sufficiency of the purported bid guarantee from the bid documents themselves at the time of bid opening--a factor which is crucial to determining the responsiveness of a bid. See Clear Thru Maintenance, Inc., B-203608, June 25, 1982, 82-1 CPD 581. On the other hand, other acceptable obligations, furnished with a bid in lieu of a bond, such as a certified check, are immediately available for a bid guarantee, because they are not subject to the same contingencies as the funds held by the Government under other

contracts. See 45 Comp. Gen. 504 (1966). The fact that a sufficient amount of money for the purpose of the bid guarantee is ultimately found to be available does not cure the deficiency in the bid.

We find that Central's bid was properly rejected as non-responsive. The protest is denied.

Milton J. Dowler
for Comptroller General
of the United States